

No. 48893-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

HEARTLAND EMPLOYMENT SERVICES, LLC,

Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(The Honorable Gary R. Tabor)

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Heartland Employment Services (“Heartland”) is an employment company within the HCR ManorCare family of companies. Heartland provides payroll and benefits administration and related employer services to affiliated companies that operate skilled nursing and assisted living centers nationwide, including several in Washington.

As a provider of professional employer services—also called a professional employer organization or “PEO”—Heartland is not subject to B&O tax on the payroll and benefits costs it administers for clients if (1) the “rights, duties, and obligations of an employer” are “allocated” in a written agreement between Heartland and its clients, and (2) employees receive “written notice of coemployment” with Heartland. RCW 82.04.540. This case was filed to resolve Heartland’s dispute with respondent Washington Department of Revenue (“DOR”) as to whether Heartland’s agreement and notice satisfy the statutory requirements.

On cross-motions for summary judgment, the trial court held that the first requirement was not satisfied because the written agreement includes a sentence reserving “ultimate” control over certain employer functions in Heartland, thereby negating the express allocation of employer rights and duties specified in the agreement. The trial court held that the second element was not satisfied because the form of notice provided to employees

was not “specific enough”—notwithstanding that the form of notice was specifically identified as sufficient in DOR’s published guidance.

The trial court was wrong on both fronts. First, the plain language of the parties’ agreement expressly and specifically allocates employer rights, duties and responsibilities to each of the parties, and the undisputed extrinsic evidence of the parties’ intent reinforces this interpretation. Second, Heartland provided statutorily adequate notice to employees that they are coemployed by Heartland and the client facility where they work on their paystubs and in their employee handbooks. The judgment below should be reversed.

II. ASSIGNMENT OF ERROR

The trial court erred in dismissing the complaint because Heartland’s written agreement and notice to employees satisfy the statutory requirements of RCW 82.04.540.

III. STATEMENT OF ISSUES

1. Whether the “rights, duties, and obligations of an employer” are “allocated” in a written agreement to Heartland and its clients.
2. Whether employees receive “written notice of coemployment” with Heartland.

IV. STATEMENT OF THE CASE

A. Undisputed Facts.

Heartland serves as the employment company for various affiliated companies throughout the country that operate skilled nursing and assisted living centers under the name “HCR ManorCare.” The affiliated companies are referred to herein as the “Clients.” Seven of Heartland’s Clients operate facilities in Washington, including Manor Care of Gig Harbor WA, LLC and Manor Care of Lynnwood WA, LLC. CP 254.

By providing professional employer services, Heartland streamlines the Clients’ administrative functions and allows the Clients to focus on providing high-quality patient care. Heartland’s professional employer services include processing payroll payments to employees, calculating income tax and other payroll withholdings, and reporting employee wages and withholding to employees and applicable state and federal agencies. CP 254, 413, 452. DOR refers to these kinds of services as those performed by an “employer of record.” ETA 3196.2015.

In contrast, the Client generally performs what DOR refers to as a “functional employment relationship.” *Id.* That is, the Client recruits employees, posts job openings, reviews employment applications, sets up and conducts interviews with viable candidates, and selects the top candidate for employment. CP 419-20, 439-41. The applicant accepts the

offer of employment by visiting the Client's facility, signing the offer letter, taking a drug test, and completing paperwork for background checks with the Client. CP 289-91, 324, 420-21, 442-43.

Once the applicant accepts employment, the Client conducts an orientation to review facility policies and procedures, compensation and benefits. CP 289-91, 324, 421-22, 443-44. The Client sets the employee's pay, and works with the employee to enroll him or her in various benefit programs. CP 427-29, 445. The Client trains each employee, establishes a work schedule, and regularly reviews the employee's time entries. CP 429-31, 446-47. Finally, the Client supervises the employee's work, handles complaints, and is responsible for discipline. CP 431-33, 448-49. In short, the Clients are responsible for managing employees in operating their long-term care facilities.

Heartland and the Clients perform these coemployment functions pursuant to an Employee Leasing Agreement (the "Agreement"), which allocates various employer rights, duties, and obligations between the parties. CP 396-406. Under the Agreement, the Clients are responsible for determining personnel needs based on the number of employees each Client "shall deem necessary" in order to "operate" the Client's facility; creating and amending the Client's "employee policies" at the Client's "sole discretion"; and "the right to provide input in recruiting, hiring,

evaluating, replacing, and supervising” employees. CP 396-98. Heartland is responsible for “payment of all federal and state employment taxes”; providing “appropriate workers’ compensation insurance”; and serving as rated employer of record for unemployment compensation purposes. CP 397.

Employees receive notice of Heartland’s role in several ways. When hired, employees receive an Employee Handbook, which states: “Most employees are employed by Heartland Employment Services, LLC, an employment company of HCR ManorCare.” CP 382-84, 386. Each employee paycheck or direct deposit slip lists both coemployers—Heartland and the Client operating the facility where the employee works. CP 390-91. Employees sign a “Letter of Understanding” acknowledging that they are “employees of” the Client operating facility and that Heartland will be the “employment company” remitting their compensation. CP 388. And, finally, Heartland posts written notice on its Intranet—available to all employees—specifically identifying Heartland as a PEO. CP 393-94.

B. Procedural History.

Heartland does not charge a fee for its services, which are performed exclusively for its affiliates. Consequently, Heartland does not have any gross income subject to B&O tax. *See Simpson Inv. Co. v. Department of Revenue*, 141 Wn.2d 139, 141, 3 P.3d 741 (2000) (company

that performed administrative services for affiliates for no fee was not subject to B&O tax on its administrative services). Consequently, prior to May 2013, Heartland was on active nonreporting status with DOR.¹

In May 2013, DOR asserted for the first time that Heartland was required to pay B&O taxes on the payroll and benefits costs of the employees for whom it provides professional employer services. Efforts to resolve the dispute were unsuccessful. Heartland filed this lawsuit in November 2013 to obtain judicial resolution of whether Heartland is subject to B&O tax on wage and benefit costs of employees working at its Clients' facilities based on RCW 82.04.540. CP 4-7.

On cross-motions for summary judgment, the trial court ruled in favor of DOR, holding that (1) because the parties' agreement reserves a right of "ultimate control" over the employees to Heartland, it fails to "allocate" the "rights, duties, and obligations" of an employer between Heartland and the Clients, and (2) the written notice provided to employees is not "specific enough." Heartland filed this timely appeal.

V. ARGUMENT

RCW 82.04.540 provides that a "professional employer organization" is not subject to B&O tax on charges to a "client" for payroll and benefit costs paid on behalf of "covered employees." RCW

¹ Each of Heartland's Washington Clients pays B&O tax on the Client's gross income without any deduction for employee or other operating costs.

82.04.540(2). “Client” is statutorily defined as anyone who “enters into a professional employer agreement with a professional employer organization.” RCW 82.04.540(3)(a). “Professional employer agreement” is defined as a “written contract” between the client and the PEO that provides for the “coemployment of covered employees” and for the “allocation of employer rights and obligations between the client and the professional employer organization.” RCW 82.04.540(3)(e).

In turn, “covered employees” are defined as individuals who enter into a coemployment relationship with the PEO and the client and who receive “written notice of coemployment with the professional employer organization.” RCW 82.04.540(3)(e). A “coemployment relationship” is statutorily defined as an “ongoing relationship” where the “rights, duties, and obligations of an employer . . . have been allocated between coemployers pursuant to a professional employer agreement and applicable state law.” RCW 82.04.540(3)(c).

In sum, Heartland is not subject to B&O tax as a PEO if: (1) employer “rights, duties, and obligations” are “allocated” between Heartland and its Clients pursuant to a written agreement;² and (2)

² DOR did not dispute that Heartland satisfied RCW 82.04.540’s additional requirement that employer “rights, duties, and obligations” are allocated pursuant to “applicable state law”—nor could it. Pursuant to RCW 18.52.030, the Clients—as operators of state-licensed nursing homes—are required to provide on-site, full-time administrators, who “shall be charged with the overall responsibility to make decisions or

employees have “received written notice of coemployment” with Heartland. RCW 82.04.540(2), (3)(a)-(e). As explained below, Heartland satisfies both elements.

A. The Standard of Review Is *De Novo*, And The Context Rule Governs The Proper Interpretation Of The Parties’ Agreement.

This appeal turns on the trial court’s application of RCW 82.04.540 to undisputed facts. The proper interpretation of a statute is a question of law that this Court decides *de novo*; DOR’s interpretation is not entitled to any deference. *Chicago Title Ins. Co. v. Washington State Office of Ins. Com’r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013); *Evergreen Washington Healthcare Frontier LLC v. Department of Social and Health Services*, 171 Wn. App. 431, 445, 287 P.3d 40 (2012). Application of RCW 82.04.540 also requires interpretation of the written Agreement between Heartland and its Clients, which is also subject to *de novo* review even if the Court considers extrinsic evidence. *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wn. App. 927, 932, 147 P.3d 610 (2006) (absent disputed facts, the legal effect of a contract is a question of law we review *de novo*).

The goal of contract interpretation is to determine the parties’ intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

direct actions involved in managing the internal operations of a nursing home.” RCW 18.52.030. Further, Washington regulations require the Clients to ensure that all employees providing direct resident care are properly trained and registered with the Washington Department of Health. WAC 388-97-1660(2)-(3).

Under the “context rule,” the parties’ intent is determined by viewing the contract as a whole, the objective of the contract, the contracting parties’ conduct, and the reasonableness of the parties’ respective interpretations. *Id.* at 667-68. Thus, a court can consider extrinsic evidence, even in the absence of ambiguity, to ascertain the meaning of words and terms so long as it does not show a subjective “intention independent of the instrument” or “vary, contradict or modify the written word.” *Hearst Comm’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502-03, 115 P.3d 262 (2005).

B. Allocation: The Plain Language of the Agreement Allocates Employer Rights and Duties Between Heartland and its Clients.

Heartland satisfies the allocation element of RCW 82.04.540(3)(c) because the Agreement expressly allocates employer rights and obligations between the parties. The Clients are responsible for determining the number and type of personnel the Client “shall deem necessary” in order to “operate” each Client’s health care facility, creating and amending each Client’s “employee policies” at the Client’s “sole discretion,” and are also expressly granted rights with respect to “recruiting, hiring, evaluating, replacing, and supervising employees.” Heartland is responsible for “payment of all federal and state employment taxes,” providing “appropriate workers’ compensation insurance,” and serving as rated employer of record. CP 396-97.

Nevertheless, the trial court concluded that *no* employer rights were allocated to the Clients because Heartland “had all the power” under the Agreement, based on the provision in the Agreement that Heartland “shall retain ultimate direction and control” over certain employment actions. 4/8/16 Tr. at 28. This was error.

To begin with, RCW 82.04.540 only requires that employer rights, obligations, and duties be “allocated” between the parties pursuant to a written agreement. RCW 82.04.540(3)(c). The statute does not require that agreement to allocate each employer responsibility exclusively to one party or the other. Nor does the statute preclude the parties from allocating the right to provide input or the right to exercise initial responsibility over employment duties. In short, if the legislature intended that the agreement allocate employer rights, duties, and obligations to one party or the other, it could have—and would have—said so. *See Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 399, 103 P.3d 1226 (2005) (“Had the legislature intended to impose such a requirement, it could have done so with relative ease . . . but it did not”).

Further, it is a fundamental principle of contract interpretation that non-technical terms be given their ordinary meaning, as reflected by dictionary definitions. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). The term “ultimate” is not a term of art. The ordinary meaning of

“ultimate” is *not* “exclusive” or “sole”; instead, “ultimate” means “last in a series, process, or progression,” “final,” or the “conclusion.” American Heritage College Dictionary (1997) at 1464. Thus, when the Agreement is given its plain meaning, it is clear that—while the parties vested Heartland with final say over certain matters—that authority did not divest the specific allocation of responsibility for those (and other) matters to the Clients in the first instance. The statute requires nothing more.

To illustrate, the law is clear that the Washington Supreme Court “has the *ultimate* authority to say what a statute means.” *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (emphasis added). Yet the trial court in this case exercised its authority to interpret RCW 82.04.540 (4/8/16 Tr. at 26), and of course this Court has its own right to de novo review of the same interpretation. *Wise v. City of Chelan*, 133 Wn. App. 167, 174, 135 P.3d 951 (2006). Thus, the Washington Supreme Court’s “ultimate” right does not divest the trial court or this Court from interpreting the statute—rather, the Washington Supreme Court’s right is the “last in a series” of interpretative authority. Likewise, the reservation of “ultimate” right to Heartland does not negate the various rights allocated to Clients, which rights the Clients undisputedly exercise. By the same token, contracts must be considered “as a whole” and “in context.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000).

As such, courts must “read each contract in such a manner that every section is given effect” and no portion is rendered “superfluous.” *Am. Agency Life Ins. Co. v. Russell*, 37 Wn. App. 110, 114, 678 P.2d 1303 (1984). The Agreement expressly and specifically allocates various employer rights and obligations to the Clients, such as creating and amending “employee policies” at the Client’s “sole discretion” and determining personnel at each facility as the Client “shall deem necessary.” CP 396-97. If the Agreement’s reservation of “ultimate” authority to Heartland over other employment actions is construed as “exclusive” authority over employees, then these express and specific allocations of rights to the Clients would be rendered meaningless.

Finally, although the Agreement’s plain meaning is sufficient to satisfy RCW 82.04.540’s allocation requirement, undisputed extrinsic evidence—the parties’ course of dealing—confirms that in giving Heartland’s “ultimate” say over certain tasks, the parties did not intend to negate the Agreement’s express allocation of rights and duties. *Berg*, 115 Wn.2d at 668 (court may consider course of dealing under context rule); Restatement (2d) of Contracts § 212, cmt. (b). In particular, DOR did not dispute that the Clients actually determine their personnel needs, establish employee policies, and recruit, hire, train, supervise, terminate, and evaluate the employees. CP 254, 289-91, 324, 413, 419-22, 427-33, 439-

49, 452.³ Thus, consistent with the Agreement’s “ultimate” proviso, the contracting parties have always recognized the Clients’ primary responsibility over these rights, duties, and obligations.

The court’s opinion in *Thayer v. Brady*, 28 Wn.2d 767, 184 P.2d 50 (1947) is instructive. There, a non-party to a contract argued for an interpretation that conflicted with the contracting parties’ understanding of their own agreement. *Id.* at 770. The appellate court rejected the non-party’s argument because “both parties” to the contract “agreed” to its meaning. *Id.* Here, as in *Thayer*, Heartland and the Clients agree that, consistent with its plain language, the Agreement allocates employer rights, duties and obligations to the Clients, and the parties have always operated based on that intent. Because it is undisputed that the parties’ intended to allocate employer responsibility and did in fact allocate such responsibility, RCW 82.04.540’s allocation requirement is satisfied as a matter of law.

³ In contrast to the admissible extrinsic evidence submitted by Heartland, DOR submitted a declaration from DOR employee Travis Yonker indicating that he had “conducted research on the internet” and located two example documents used by PEOs. CP 600-06. The trial court commented that the documents reflect examples of PEO agreements where the language is “much more clear.” 4/8/16 Tr. at 27. Critically, however, the documents were not PEO agreements between coemployers, but rather notices and agreements with employees—and, regardless, the documents were inadmissible because they were not authenticated and had nothing to do with Heartland or the Clients. Nevertheless, the trial court denied Heartland’s motion to strike the documents, noting that its reference to them was mere “dicta.” *Id.* at ___. The trial court’s refusal to strike the documents was error and, to the extent the court considered them in its analysis, that too was error.

In sum, for the allocation requirement in RCW 82.04.540, all that matters is that the Agreement allocate the Clients responsibility for some employment functions. The Agreement clearly does so.

C. Notice: Employees Receive Adequate Notice Of Their Coemployment Relationship With Heartland And The Clients.

In addition to allocation, RCW 82.04.540 requires that employees “receive written notice of coemployment with the professional employer organization.” RCW 82.04.540(3)(d). Nothing in the statute dictates the exact language or form of notice required. Although there was no evidence that the employees did not receive notice or did not understand the parties’ PEO arrangement, the trial court concluded that notice was “not as specific as it should be.” 4/8/16 Tr. at 29. This too was error. It is undisputed that employees received abundant notice of their coemployment relationship with Heartland and the Clients—in a form specifically approved by DOR.

First, employees received a handbook stating that “most employees are employed by Heartland Employment Services, LLC an employment company of HCR ManorCare.” CP 382-84. Second, employee paystubs included the names of both Heartland **and** the Client operating the facility where the employee works. CP 390-91. DOR has previously interpreted RCW 82.04.540 to require no additional notice: when “PEO is listed in the employee handbook” and “the employee’s paystubs contain PEO’s name,”

then “employees received sufficient notice of coemployment with a PEO.” Excise Tax Advisory 3192.2014.⁴ DOR cannot repudiate its own interpretation, upon which Heartland was entitled to rely. *Tesoro Refining and Marketing Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 323, 190 P.3d 28 (2008) (“A government agency may not repudiate one of its own regulatory interpretations after a third party has relied upon it to their detriment.”).

Even though the law requires nothing more, written notice to the employees did not end there. Third, employees receive and sign a “Letter of Understanding” acknowledging that they are “employees of” the Client operating facility (e.g., ManorCare of Gig Harbor) and that Heartland will be the “employment company.” CP 388. And, fourth, Heartland posts a written notice on its Intranet, available to all employees, identifying Heartland as a Professional Employer Organization. CP 393. These myriad forms of notice—fully consistent with DOR’s own interpretation of RCW 82.04.540—are more than sufficient to provide employees with notice of their coemployment under Washington law.

VI. CONCLUSION

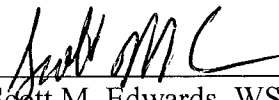
As a PEO, Heartland is entitled to deduct payroll and benefits costs paid to employees working at its Clients’ facilities because: (i) Heartland and its Clients are parties to a written Agreement allocating employer

⁴ Available at taxpedia.dor.wa.gov/documents/current%20eta/3192.doc (last accessed August 26, 2016).

rights, duties and obligations; and (ii) employees receive written notice of coemployment. This satisfies the requirements of RCW 82.04.540. The trial court court's judgment should be reversed, with instructions to grant summary judgment in Heartland's favor.

RESPECTFULLY SUBMITTED this 31st day of August, 2016.

LANE POWELL PC

By 

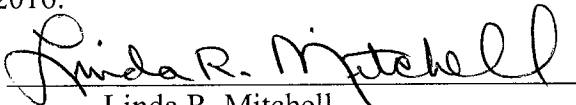
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CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the laws of the State of Washington that on August 31, 2016, I caused to be served a copy of the foregoing document to be delivered in the manner indicated below to the following person(s) at the following address(es):

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Linda R. Mitchell

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